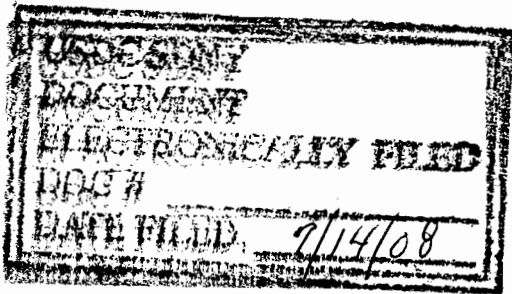


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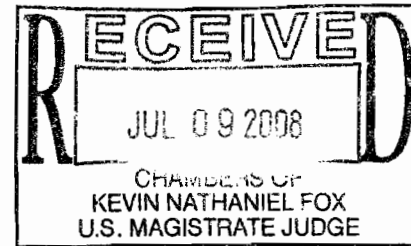
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P. 2



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**MEMO ENDORSED**

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July 9, 2008

VIA FACSIMILE 212.805.6712  
 Magistrate Kevin Nathaniel Fox  
 United States District Court  
 Southern District of New York  
 500 Pearl Street  
 New York, NY 10007

RE: DANIEL SZAROLETA V. METRO-NORTH COMMUTER RAILROAD  
 07 Civ. 7639 (DC)

Dear Magistrate Fox:

As you know, I am plaintiff's counsel in the above-entitled case. I write in follow-up to my conversation with Sanja Zgonjanin in your chambers to advise you of an issue that has arisen relating to the trial that is presently scheduled for July 21, 2008. Specifically, when we were last before Your Honor, we discussed the expert witnesses listed on the Joint Pretrial Order. Dr. Jason Cohen is the plaintiff's treating physician and is the surgeon who performed a discectomy on plaintiff in 2007. Following the conference with the Court, my office attempted to secure Dr. Cohen's appearance in person at trial, but we were advised that he had surgeries scheduled when we were likely to need his testimony (the first and second day of trial) and consequently we agreed on 6/26/08 to record his testimony by videotape. Accordingly, we advised defense counsel on 6/27/08 of the date, time and location in Central New Jersey.

The video deposition was supposed to take place tomorrow, 7/10/08 at 5:30 p.m. in the doctors office. I learned about 45 minutes ago in confirming with Dr. Cohen's office that he did not have it on his calendar and would not be appearing. Despite imploring with the doctor's office to cancel whatever conflicting appointment had been scheduled and explaining that the alternative was service of a subpoena, I was

told that he would not be available and was given September 11, 2008 at 5:30 p.m. as the next available date for a video deposition. I immediately contacted defense counsel but he was not in his office. I then called the Court and Ms. Zgonjanin advised me to write to you.

As you are aware, Dr. Cohen's testimony is critical to plaintiff making out even a prima facie FELA case. His examinations, findings, diagnosis, treatment and prognosis are the crux of the plaintiff's damage claim. In an effort to keep up the pressure on the doctor, I have faxed the enclosed subpoena to Dr. Cohen and have also sent it out for service. However, in an effort to head off the problem, I write to request an adjournment of the trial to allow me to secure the doctor's testimony, preferably by court order. As an aside I note that the railroad has scheduled Mr. Szaroleta for a return to work exam on 7/17/08 to see if he might be able to come back to his employment.

Please advise how you would like me to proceed in light of these emergent circumstances.

Respectfully submitted,

Marc Wietzke

MW:MW

Cc: José Rios, Esq.

7/14/08

*The application, that the trial scheduled to commence on July 21, 2008, be adjourned, is denied. A subpoena is the appropriate tool, under the Federal Rules of Civil Procedure, to secure the attendance of a witness at a trial. No additional writ appears to be needed to accomplish that goal.*

**SO ORDERED:**

*Kevin Nathaniel Fox*

**Hon. Kevin Nathaniel Fox  
United States Magistrate Judge**